

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PETER A. CURATO and	:	CIVIL ACTION
CECELIA ANNE CURATO	:	
	:	
v.	:	
	:	
GERALD M. SALUTI, et al.	:	NO. 98-2703

MEMORANDUM AND ORDER

HUTTON, J.

June 16, 1999

Presently before this Court is the Motion for Protective Order by the Defendants Gerald M. Saluti, Joseph P. Diebold, IVAX Corporation, and IVAX Industries, Inc. (Docket No. 21) and the Reply by Plaintiffs Peter A. Curato and Cecelia Anne Curato (faxed copy)¹. For the reasons that follow, the Defendants' Motion for Protective Order is **GRANTED**.

I. BACKGROUND

This is a job discrimination case. On May 27, 1998, Peter A. Curato and Cecelia Anne Curato ("Plaintiffs" or the "Curatos") commenced the instant action by filing a Complaint in this Court against Gerald M. Saluti, Joseph P. Diebold, IVAX Corporation and IVAX Industries, Inc. (collectively, the "Defendants"). The

¹In Plaintiffs' Reply to the Defendants' Motion for Protective Order, they assert that "it is anticipated that Dr. Frost's deposition will be taken [on June 16, 1999]." (Pls.'s Reply at 2.) Thus, the Defendants request that the Court consider the matter on an expedited basis.

instant motion concerns the anticipated deposition of Phillip Frost ("Frost"), the Chief Executive Officer and Chairman of the Board of IVAX Corporation.

The core factual allegations on which the Plaintiffs base their Amended Complaint are as follows. Peter A. Curato was an employee and corporate officer of IVAX Industries, Inc. A female employee of IVAX Industries, Inc., over whom Peter A. Curato exercised supervisory control, accused him of sexually harassing her. In response, certain of the Defendants attempted to discipline him for his actions. The discipline was never effected, however, because Peter A. Curato left IVAX Industries, Inc. on short-term and then long-term disability, and he did not return.

Depositions have been taken of several officers and managers of IVAX Industries. Further depositions are scheduled in Miami, Florida for Tuesday, June 15, 1999, and Wednesday, June 16, 1999. It is anticipated that Frost's deposition will be taken on June 16, 1999. On June 4, 1999, the Defendants filed the instant motion for this Court, pursuant to Federal Rule of Civil Procedure 26(c), for a protective order barring the Plaintiffs from taking the deposition of Frost. On June 15, 1999, the Plaintiffs faxed this Court a copy of their Reply to the Defendants' Motion for Protective Order. Because the Curatos have requested this Court to consider Defendants' motion on an expedited basis, the Court now considers Defendants' Motion for Protective Order.

II. DISCUSSION

A. Relevance

Rule 26(b)(1) provides that discovery need not be confined to matters of admissible evidence but may encompass that which "appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). Relevancy is to be broadly construed for discovery purposes and is not limited to the precise issues set out in the pleadings or to the merits of the case. See Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978). Rather, discovery requests may be deemed relevant if there is any possibility that the information may be relevant to the general subject matter of the action. See id. As this Court has noted, "[r]elevance is broadly construed and determined in relation to the facts and circumstances of each case." Hall v. Harleysville Ins. Co., 164 F.R.D. 406, 407 (E.D. Pa. 1996). Once the party opposing discovery raises its objection, the party seeking discovery must demonstrate the relevancy of the requested information. See Momah v. Albert Einstein Med. Ctr., 164 F.R.D. 412, 417 (E.D. Pa. 1996). The burden then shifts back to the objecting party, once this showing is made, to show why the discovery should not be permitted. See id.

The Defendants contend that Frost's testimony is irrelevant to the Plaintiffs' claim. In their Reply to the present motion, the Plaintiffs' assert that Frost's testimony is relevant to their

claim of job discrimination for essentially two reasons. First, the Curatos allege that "Frost was very mindful of criticism on Wall Street and in the public domain of his management style as it related to the value of IVAX Corporations Stock." They fail, however, to explain show this alleged awareness on the part of Frost is connected to this case. The essence of Plaintiffs' claim is that the discipline imposed against him for allegedly sexually harassing a female employee was discriminatory. Frost states in a declaration that he has no personal knowledge about the IVAX Industries' decision to discipline Curato. He states further that he played no role in that decision. Moreover, he states that, until confronted with the possibility of his being deposed, he had never heard that a former IVAX Industries employee accused Curato of sexual harassment. Thus, the Court finds that the Plaintiffs have failed to demonstrate how their first stated reason for deposing Frost is relevant to the present action.

Second, the Curatos contend that they wish to depose Frost regarding rumors that allegations of sexual harassment were made against him. The Plaintiffs contend that IVAX Corporation treated Frost better than IVAX Industries treated Peter Curato. This argument fails for several reasons. First, Frost has declared that, as far as he is aware, he has never been charged with sexual harassment. Second, Caterina Coloca, a lawyer in the IVAX Corporation in-house legal department, has declared that there is

nothing in the IVAX Corporation legal files and nothing in Frost's personal file that even suggests that anyone ever accused Frost of sexual harassment. Third, and finally, even if the rumors were true, they would have no bearing on this case.

To make out a claim for a disparate treatment violation, the Curatos must show that Peter Curato and Frost were similarly situated. Shumway v. United Parcel Serv., 118 F.3d 60, 64 (2d Cir. 1997). In the present matter, Curato and Frost are not similarly situated. For example, Curato worked for IVAX Industries; Frost works for IVAX Corporation. Curato was answered to Saluti, his supervisor. Frost has no supervisor; he answers only to the IVAX Corporation board. Moreover, not only is Frost older than forty (40) years of age, he is older than Curato. Establishing that an employee over forty and older than Curato was treated more favorably than Curato is not relevant to this action. See Fowle v. C & C Cola, 868 F.2d 59, 61 (3d Cir. 1989). Accordingly, this Court finds that Frost has no information which may be relevant to the subject matter involved in the pending action.

B. Protective Order

Rule 26(c) authorizes a court to issue a protective order where justice so requires and upon good cause shown. The party seeking a protective order bears the burden of demonstrating 'good cause' required to support such an order." Trans Pac. Ins. Co. v. Trans-Pac. Ins. Co., 136 F.R.D. 385, 391 (E.D. Pa. 1991). To meet

their burden, the Defendants state that the deposition of Frost will cause annoyance, oppression, undue burden and expense, because his testimony is "irrelevant" to the Plaintiffs' claim. As stated above, this Court finds that the Plaintiffs have not shown that Frost can provide relevant information that can "lead to admissible evidence." McClain v. Mack Trucks, Inc., 85 F.R.D. 53, 57 (E.D.Pa.1979). Accordingly, this Court grants the Defendants' Motion for a Protective Order.

An appropriate Order follows.

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O R D E R

AND NOW, this 16th day of June, 1999, upon consideration of the Motion for Protective Order by the Defendants Gerald M. Saluti, Joseph P. Diebold, IVAX Corporation, and IVAX Industries, Inc. Docket No. 21) and the Reply by Plaintiffs Peter A. Curato and Cecelia Anne Curato (faxed copy)², IT IS HEREBY ORDERED that the Defendants' Motion for Protective Order is **GRANTED**.

BY THE COURT:

HERBERT J. HUTTON, J.

²In Plaintiffs' Reply to the Defendants' Motion for Protective Order, they assert that "it is anticipated that Dr. Frost's deposition will be taken [on June 16, 1999]." (Pls.'s Reply at 2.) Thus, the Defendants request that the Court consider the matter on an expedited basis.